

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9641 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

BABUBHAI MERVANBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 9641 of 1993
MRS KETTY A MEHTA for Petitioner No. 1
MR SP HASURKAR, AGP for Respondent No. 1
MR NITIN N PANDYA for Respondent No. 2
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CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI

Date of decision: 24/09/2004

ORAL JUDGEMENT

#. The petitioner challenges the order dated 10th June,
1993 passed by the Gujarat Revenue Tribunal in Revision

Application No. TEN/B.S./10/88, upholding the order dated 1st December, 1987 of the Deputy Collector, Valsad, by which the petitioner's appeal against the order of the Mamlatdar & ALT made on 20.4.'85 under Section 84-C of the Bombay Tenancy & Agricultural Lands Ceiling Act, 1948 was dismissed.

#. The Mamlatdar & ALT had held that the petitioner was in an unauthorized possession of the agricultural land in question and ordered it to be handed over to the respondent. It was held that no prior permission was obtained before making the Will in favour of the petitioner, and the entry on the basis of the Will had been deleted.

#. The learned counsel appearing for the petitioner contended that the proceedings undertaken by the Mamlatdar & ALT under section 84-C of the said Act were without jurisdiction, because, this was not a case of transfer of the property, but this was a case where the petitioner claimed the property under a Will. It was submitted that the property which devolves under a Will cannot be said to have been acquired by any transfer inter vivos. It was argued that Section 43 of the said Act was attracted in cases of transfer inter vivos by sale, gift, exchange, mortgage, lease or assignment and when such transfers were made without previous sanction of the Collector, the embargo of that provision was attracted. Reliance was placed on a decision of this Court in Pravinbhai Bhilabhai Gor Vs. Rajiv Gupta, reported in 1998 (2) GLH 852, in which it was held, in the context of the provisions of Sections 43 and 63 of the said Act, that Will was not an instrument of transfer of property by sale, gift, exchange, mortgage, lease or assignment, nor was it an agreement, and, that neither Section 43 nor Section 63 envisaged prior permission of an authority for executing a Will. It was also argued that validity of a Will could not have been decided by the Tenancy Court.

#. The learned Assistant Government Pleader, appearing for the respondent no. 1, on the other hand, supported the decision of the Revenue Tribunal, contending that the purpose of the statute would be frustrated if property is allowed to be disposed of by making a Will when Section 43 prohibited a transfer of such property. It was argued that under Section 43(2) of the Act, any transfer or partition or any agreement of transfer of any land or any interest therein in contravention of sub-section (1) was invalid. It was also contended that having regard to language of the Will, since there was quid pro quo, it

was, in reality, a transfer by way of sale and not a Will.

#. It is clear from the record that the petitioner had put forth his claim on the strength of a Will of deceased Kashiben. She had made a Will on 4.9.'77 under which she bequeathed survey nos. 155/1, 154/2, 154/4 and 154/5 in favour of the petitioner as per his case. The petitioner had taken up a contention in response to the show cause notice issued to him under Section 84-C of the Act that, all these four survey numbers were acquired by him under a Will and were in his possession. The Revenue Tribunal held, by examining a copy of the Will, which was shown to the Tribunal, that the petitioner had paid installments payable by Kashiben under Section 32-G of the Act and having regard to such payments, Kashiben had made a Will in his favour and, therefore, the Will was required to be treated as a transfer. It was also held that Kashiben did not have any authority to make a Will of the lands belonging to her sons which were included under the said Will. Treating the document as a transfer, the Tribunal upheld the findings of the authorities below and remanded the matter for restoring possession in accordance with the provisions of Section 84-C(2) of the Act.

#. It is clear from the provisions of Section 43 of the said Act that restriction on transfer of land imposed thereunder was clearly in respect of the transfers inter vivos and the provisions could not be invoked in the context of the Wills under which there is no transfer inter vivos. In P.B. Gor (supra), the learned Single Judge of this Court, in terms held, in the context of the provisions of Section 43 of the said Act, that, Will is not an instrument of transfer of property by sale, gift, exchange, mortgage, lease or assignment, nor is it an agreement. There is a devolution of interest of deceased by succession in the nominated persons under a Will and not transfer of interest of a person in any of the modes of transfer prescribed under the said provision, which all relate to transfer inter vivos. It was held that neither Section 43 nor Section 63 of the said Act envisage prior permission of the authorities for executing a Will that would take effect after the death of a person, which he has a right to vary, cancel or modify any time before his death as many times as the testator desires. The Revenue Tribunal did not take into consideration this aspect of the matter and proceeded to rely on a copy of the Will which was shown to it on the basis of which the petitioner was claiming his rights. In fact, a Will is required to be proved in accordance with law and a copy of the Will could not have been

straightaway relied upon without the original Will having been proved as per the law by examining the attesting witness in consonance with the provisions of Section 68 of the Evidence Act. The Tribunal did not examine whether the question of validity of a Will could have been gone into by it in this matter. However, under Section 84-C of the Act, it is not only in respect of the transfer inter vivos, but also in respect of acquisition of any land that the Mamlatdar & ALT is empowered to make an inquiry to find out whether the transfer or acquisition is or is not invalid. It was the case of the petitioner that he had acquired the property under a Will, and therefore, it was not necessary to brand the Will as a transfer document. It was first required to be seen whether the petitioner was able to establish the Will in accordance with law and whether there was any acquisition of land made which can be said to be invalid under the provisions of the said Act.

#. The petitioner has, therefore, made out a case for exercise of jurisdiction under Article 227 of the Constitution, which is invoked by the petitioner, in view of the error in the exercise of jurisdiction committed by the Tribunal. The impugned order of the Revenue Tribunal cannot, therefore, be sustained and is hereby set aside with a direction to the Revenue Tribunal to reconsider the revision application and take a fresh decision thereon in accordance with law and in light of the above observations. Rule is made absolute accordingly with no order as to costs. If there was any interim order operating in the revision application, which now stands restored before the Tribunal, that order will continue until the Tribunal makes any further order.

[R.K. ABICHANDANI, J.]

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